EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108991/21 (V)

Held on 23, 24 & 25 August 2021

Employment Judge J M Hendry

Mr. R Addison	**Claimant Represented by Mr. R Milvenan, Solicitor**
Dales Marine Services Ltd	**Respondent Represented by Mr R A Falconer, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

1. The claimant was unfairly dismissed from his employment.
2. The claimant is entitled to a monetary award amounting to Three Thousand Six Hundred and Fifty-Six Pounds and Eighty-One pence (£3656.81), consisting of a basic award of £1614 and a compensatory award of £2042.80.
3. The Recoupment Regulations apply. The prescribed element amounts to £1320.63. The monetary award exceeds the prescribed element by Two Thousand Three Hundred and Thirty-Six Pounds and Eighteen pence. (£2336.18).

REASONS

1. The claimant in his ET1 contended that he had been unfairly dismissed from his employment with the respondent company. The respondent opposed the claim arguing that he had been fairly dismissed on the grounds of misconduct.

2. The issues for the Tribunal to determine were firstly whether or not the claimant was dismissed for misconduct and secondly whether the dismissal was within the range of reasonable responses open to the employer in the circumstances of the case.

Evidence

3. The Tribunal heard evidence from Mark Massie, the HR/QSE Manager of the respondent company and from Michael Milne, Chief Operating Officer and from the claimant. It considered the Joint List of Documents lodged by the parties prior to the hearing and also an amended Schedule of Loss lodged with consent following the close of the hearing.

4. Agreement was reached that the Schedule of Loss would be checked and if necessary recalculated following input from Mr Falconer's clients. This was then done and an agreed Schedule lodged.

Findings in fact

5. The claimant is an experienced tradesman. He qualified as a welder and plater. He has over 30 years' extensive experience in the shipbuilding industry latterly holding various senior supervisory posts such as that of production manager.

6. The respondent company is involved in ship repair and other related engineering services. They have three main centres of operation in Aberdeen, Edinburgh and Greenock. They employ over 135 staff. They have no dedicated HR function. HR matters are dealt with by Mr Mark Massie.

7. The claimant lodged a C.V. with the respondent company on a speculative basis and was invited for interview and appointed as a project manager. He received a letter containing his main terms and conditions of employment from 6 February 2019 (JBp.57-71). He signed the contract on 6 February 2019 and began work on that date.

8. The claimant successfully completed a three-month probationary period.

9. The respondent was busy during his period of employment. They were often asked to carry out work at short notice and at competitive prices. The claimant often had to oversee more than one project.

10. The claimant was given a health and safety induction (JB.43-44).

11. The claimant's contract of employment made reference to the company disciplinary procedure although he was not provided with a copy.

12. The claimant was paid £19.50 per hour for a 39-hour week. The claimant's net weekly basis pay was £604.81 per week. His gross weekly pay was His average net weekly pay was £903.13 taking account of overtime.

Air Cushion Barge

13. In late 2020 difficulties arose between the claimant and the respondent's management in relation to work being carried out on an air cushion barge. The barge was built by Ferguson Marine. It then had to be cut into sections to allow it to be loaded and shipped to Azerbaijan. The client asked for additional work. At a later date it was found that there were some defects in the original construction and what was original construction work and later work carried out by the respondent. The supervision of the project was carried

out by an Ian Thomson who the claimant was assured by the respondent's managers was a competent superviser.

14. Difficulties arose between the respondent and the client both regards to the quality of some of the work and the final sums invoiced. The company's position was not assisted by the fact that no detailed records were kept of the cost of the additional work including the work carried out by the welder The upshot was that the respondent had to give the client a discount of £40,000. This was not the only project the claimant was managing at the time. The respondent's obtained a statement from the claimant's line manager Billy Pollock who indicated that he did not think it necessary for the claimant to be present throughout the whole job and that the superviser should have been more than capable of running the job (JB.77).

15. The claimant was called into a disciplinary hearing on 3 December. He was questioned about raising a new PO (purchase order) for additional work on the contract. He had raised a VO (Variation Order). Mr Pollock had been responsible for Invoicing the work. Mr Ian Thomson was responsible for the day to day supervision of the work. The claimant was criticised both for the failure to have the necessary back up paperwork and also for the quality of some of the work. The claimant indicated there was a difficulty in obtaining reliably competent workers (JB.79).

16. Mr Massie wrote to the claimant on 14 December. He issued him with a written verbal warning. He wrote:

"*There had been failings in the control of this project in a supervisory capacity and in the control of the works carried out and the hours associated with those works.*
All works carried out at offsite location should be covered by signed timesheets, this protects the Company from any possible future dispute following invoicing.
In this case the lack of sign timesheets to cover work carried out has cost us more than £40,000 at a time when there are already financial restrictions placed on the Company.

This being the case we decided to issue with this written verbal warning that will be held on record for a period of six months. Should there be any further disciplinary matters, then we will have no option to take further action against you, and as a result your job may be at risk.

At this time I would like to make it clear that should there be any further failings in performance resulting in a financial loss such as this then we will have to seriously consider your position with the Company and your job may be at risk."

17. The claimant was given the right of appeal which he did not exercise. He spoke to Billy Pollock about it and was told not to worry as it was the lowest sanction available to the respondent and would only remain live for six months.

Caledonian Isles-sewage tank

18. The respondent was contracted to strip out an old sewage tank from the vessel, Caledonian Isles, and replace it with a newly fabricated tank. The tank was fabricated abroad, and it became clear that due to Brexit difficulties was not going to be delivered on time.

19. Mr Addison was to supervise the project. Mr Massie advised him that the new tank would not be available and accordingly it had been agreed with the clients that the old tank should be repaired as a temporary measure.

20. The claimant inspected the vessel and walked around it with one of the senior crew. He discussed the repair with the ship's engineer. It had been ascertained that some parts of the steel structure of the tank had degraded by up to 40% of it's thickness. It was in a poor state. The claimant decided after discussions with the ship's Chief Engineer, that the easiest way of carrying out the work was for the tank to be lifted and filled with water to one and a half metres depth (the operating level). Leaks could then be detected and dealt with. This is what happened. The repairs ended up being more time consuming process than the claimant originally envisaged and he was

later criticised for using the water testing given the time it took to fill and empty the tank.

21. It is common for air pressure to be used to test if a metal structure has been properly welded and is airtight. This was known as Air Pressure testing. Prior to the work on the ship the claimant had noticed the equipment for carrying out air pressure tests in the respondent's offices. He asked Mr C Connaghan, the company's Health and Safety representative if there was a Risk Assessment and Method Statement kept for the use of this type of test. Mr Connaghan thought there was. However, after having looked at the company records contained on a shared hard drive, the claimant returned to Mr Connaghan and advised him that there was no Risk Assessment or Method Statement. Mr Connaghan indicated that one would have to be made up by Aberdeen (meaning by Mr Massie who was based there) but took no steps to arrange for this to be done.

22. On 23 January an incident occurred on the vessel. Work was to be carried out on the area around the funnel. This involved welding pad eyes to the deck. A permit to work was issued. The nominated responsible person was a D Graham. The permit was issued by Mr Addison. The Responsible Person on the permit permission was Mr Graham. It also had Mr A Kane, an apprentice welder's name on it.

23. The claimant had previously made an assessment of the vessel below the welding work along with a crew member. It had not been clear that some of the welding would take place above a locked cupboard on the deck below. When the welding took place there was heat transfer from the weld through the deck plate into the cupboard causing paint to burn and smoke. This set off a fire alarm. A crew member unlocked the cupboard and found the problem.

24. As part of the process involved in such welding work that fire watchers should be stationed near the area where there might be heat transfer to keep a look out for fire.

25. At a later point CalMac recorded the matter as a near miss as follows (JB82):

"*Approximately 16.10 the fire alarm was activated in the crew alleyway. This was caused by smoke transfers from a dry dock welding job above the funnel. The job was stopped, deck head panels removed to check for fire and the yard management informed. The yard apologised for missing a fire watch underneath and investigated one immediately, there was a fire watch not in that location. For clarity on inspection there was no fire.*"

26. Mr Connaghan was involved in the initial investigation. He completed an incident reporting form (JB.93). It recorded:

"*Yard safety rep. Mr. Connaghan has spoken to Dales Marine Project Manager Mr. Ralph Addison who is the manager for the works in hand. He has been told there has been a clear breach of our company's safe working procedures and risk assessments during this incident. There were fire watchers in place for the work that was being carried out but not all areas were being checked properly as the cupboard next door was locked.*
Had a proper site inspection risk assessment being carried out, the cupboard areas should have been identified as a heat transfer risk and the request been made to the crew for it to be unlocked prior to the hot work commencing. Mr. C Connaghan has requested for the project manager Mr. Addison to carry out a toolbox talk with all yard personnel and yard foreman about hot works and fire watcher duties."

27. Mr Connaghan drew to the respondent's managers attention that the claimant might not have had fire watcher's on duty when the incident occurred. Statements were obtained from Mr Graham, Mr Kane and also from 3 Romanian workers who were working on the vessel at that point. The incident had occurred at 16:10. Mr Graham, the permit holder, was due to leave work at 4pm. He wrote:

"*We asked Ralph if we had to stay when the welder was welding and he said no. We could be sent on another job when done. He came onto job at 15:30 and we started packing up and was told the fire alarms had went off at 16:10. Our shift finished at 16:30.*"

28. Mr Kane also gave a statement (JB.88). He indicated that he had gone to Mr Addison at 3pm to get a welder and asked whether they should stay with the welder. He recorded:

"*Ralph said no. Once your done you can go onto Craig's job. So we said ok, what about a fire watcher? Ralph said no, so we went back up to the job and waited for the welder. He came up at 3pm. He fully welded the funnel ones first then he went into welding the deck ones while we started to assemble the mounts of the ones that were done. We started to pack up around 3.50 whilst the welder was still welding as the Romanians stay later than us. This was when we were alerted about the smoke alarms at 4.10…..*"

29. The Romanian workers gave statements (JB.89, 91 and 93). Mr Massie noted that their names were added to the permit the following day. He suspected the claimant had done this. The Romanians stated that they were told by the claimant to continue work with other colleagues in the smoke funnel area. They arrived at the work site and began working out which areas had to be watched. They began fire watch duties at 16:30.

30. Mr Connaghan provided the respondent with a statement (JB.92):

"*I then started my investigation on what happened and how…. I spoke to Mr. Addison regarding this…..and he said he was surprised about the heat transfer going into the cupboard as he thought the location of the welding on the deck was on the other side of the bulk head of the cupboard…. I then showed him the photo of the burn marks inside the cupboard that I'd taken…..He said yes, I've looked at it myself and it looks like we have missed it with our fire watchers that were in place and the room adjacent to the cupboard and the one in the corridor. I then said we will have to get a witness report from him of what happened and he said he will sort it out for me later than day.*

I then went to the permit office to get the closed out permit of the incident…I then noticed the job completion section hadn't been closed out by Mr. Graham regarding the incident and permit and he told me he was finished with the job at 4pm and told his supervisor about the permit that he will have to sort out a new one as he was finished with the job now and was told by Mr. Addison that it will be ok as he will sort out the fire watchers to continue the works.
Mr. Graham then signed the completion part of the permit with the time he said he finished the job after I had interviewed him because he said his name is in the NRP section of the permit and didn't want to be held responsible for the near miss after he had left the job…..I then told him and Mr. Kane to write this in his report of events. regarding fire watchers and permit for the incident. Due to Mr. Addison being off work Mr. Connaghan phoned Mr. Addison regarding the incident and he has repeated what he said earlier…..that there was one welder and two fire watchers with the usual precaution in place i.e.

fire blanket and fire extinguisher at hand after Mr. Graham and Mr. Kane had finished their part of the operation and was replaced by the three personnel mentioned in this report but unfortunately they didn't get the cupboard opened during hot works as they thought it was outside the hot work area."

31. The respondent wrote to the claimant on 25 January (JB.84):

"*I am writing to tell you that Dales Marine Services are considering taking disciplinary action against you.*

This action is being considered regarding your supervision of work carried out on the sewage tank system on the Caledonian Isles.
You will be immediately suspended from tonight on full pay until such a time as the Company has completed a full investigation…."

32. In the interim period Mr Milne had developed concerns about the length of time the sewage tank work was taking. He was concerned lest the company might incur penalties if the sailing of the vessel was delayed because of these works. The sailing would have been delayed because of the failure to complete the sewage tank in time. In the event other problems with the vessel unrelated to the respondent's work caused a delay in sailing.

33. Mr. Massie obtained the statements and discussed matters with Mr. Connaghan. He wrote to the claimant on 28 January (JB.94) in the following terms:

"*I am writing to tell you that Dales Marine Services is considering taking disciplinary action against you.*
This action is being considered with regards your supervisional work carried out on the Caledonian Isle sewage tank.
You are invited to attend a disciplinary hearing on Tuesday 2 February at 11am in the main office where this will be discussed.
You are entitled, if you wish to be accompanied by another work colleague or trade union official."

34. Notes were taking of the meeting which were signed by the claimant and Mr Massie.

35. Mr Massie asked the claimant about the repair to the sewage tank. Mr Massie explained his understanding of the position. He stated that on Monday 25 January he had spoken to the vessel's Chief Engineer about filling a tank with water to conduct a hydro weight test. He confirmed that once the tank had been lifted and inspected it was found that a section of welding had been missed. The claimant argued that the photograph shown to him was not part of the area he had repaired. He confirmed there had been a visual inspection carried out by himself and the chief engineer before the tank was refitted. He was asked why the tank had not been pressure tested and he answered:

"*I followed industry standards by doing a hydro test of the old tank. It was hanging on there on chain blocks and pad eyes. I could not increase the weight of the tank while it was on the chain block and pad eyes.*" He was asked again could he have carried out an air test. He responded: "*There had previously been pipes getting pressure tested on site and on checking the company risk assessments I could not find one for pressure testing vessels. This was mentioned to Charlie at the time and he said he could get one made up, it would have been done in Aberdeen. With no safe system of work in place the pressure testing a tank like this and also the cost implications of making blanketing for the tank I believe the safest and most cost effective way to carry out the hydro test I did. Since I have done this I have obtained a test form from an external commission authority and states that the hydro test is the correct method of carrying out the pressure test by filling the tank with fresh water in increments. Air to 2PSI to a safety valve to be fitted at 2PSI.*"

36. The company was sensitive about the contract as this was the first of a long-term contract with CalMac and they were embarrassed that the repair work was not carried out in the timescale originally envisaged.

37. There was no reference to the fire watch incident.

38. Mr Massie made some further investigations (JB.103). He asked the claimant about work to the tank and a pressure test was conducted to the lower tank (below the sewage tank). This area required to be opened up to get access underneath the sewage tank. Mr Addison responded: "*It was agreed that attending LR surveyor and the vessel technical superintendent the 100% metal particle inspection would be undertaken on the bottom shell insert and*

tank top plating which were testing was not asked for or discussed." He reiterated there was no capability to undertake air pressure testing because of the lack of risk assessment. Mr Massie contacted Mr Connaghan and asked about risk assessments. Mr Connaghan responded he was disappointed because at no time had Mr Addison asked him for risk assessments. Mr Massie also asked if Mr Connaghan had metal gauges. Mr Connaghan confirmed that he did.

39. Mr Massie concluded that the claimant had failed to carry out the work properly and had insufficiently supervised the quality of the work and it had not been carried out as quickly as it could have been carried out using pressure testing. He wrote to the claimant on 11 February dismissing him (JB.109). He wrote:

"*Works were carried out on the vessel sewage tank and it's lower water ballast tank. These works were supervised and managed in their entirety by yourself. On completion of works, a hydro test was carried out, and the upper sewage tank was found to be leaking. On further inspection this leak was attributed to a missed section of welding on the underside of the tank. On further testing of the sewage tank numerous other small leaks were identified by sections of welding having to be repaired. The cost of this work to the company were £5,658.16. It could have been considerably higher had it not been for the vessel's delayed return to service.*

We had just started a long-term contract with Calmac and this was the first vessel to be completed as part of that contract. As part of this new contract there are financial penalties imposed on the company for late delivery of vessels. Luckily this repair work did not delay the handover of the vessel due to late arrival of a gearbox. In all the circumstances, had it not been for the gearbox delayed, this repair work could have cost the Company over £80,000 and lost sailing penalty fees.

This is the second failure of your project management in as many months that as resulted in a financial loss to the Company with potential cost being in the region of £125,000.
As the project manager for this works it is your responsibility to ensure works are fully completed and carried out to the required standards, there has been a failure on both counts for the section (of welding being missed and further welding not being to the required standard).

Questions were also raised regarding of both the sewage tank and lower water ballast tank, which is an intracule part of the vessel's hull. Standard practice for testing a tank on completion of works would be for them to be

blanked off and pressurised to 2PSI then locked off and monitored for a set period to ensure there was no loss of pressure pouring it out of the tank….. On more than one occasion you claim to have approached your Health and Safety advisor requesting such documentation and were told it would be supplied by myself in the Head Office in Aberdeen at no point have you ever raised these safety concerns to myself nor request any formal risk assessment or documentation regarding pressure testing or any other works carried out on site. There was also no record of you raising these issues and concerns with your line manager Billy Pollock."

40. The letter also dealt with the fire watch incident and the failure of Mr Graham to be replaced as the nominated responsible person when he left at 16:30. Mr Massie wrote: "*I also believe that the two employees who were placed on fire watch duty were only instructed to do so following the activation of the vessel's fire alarm, no fire watch person was on place when the welding first started and the heat transfer occurred. The statements also received seemed to indicate that the names of the three employees were latterly joined the work task only added to the permit of work the following day.*" He then reminded the claimant of the terms of the letter of 14 December and then wrote: "*as a result of this, we have taken the decision to terminate your employment with the company with immediate effect. This is a decision we have not taken lightly but due to the continued supervisory failures and the resultant losses to the Company, both financial and reputational we feel this is our only option.*"

41. The claimant was given the right of appeal. The claimant appealed by e-mail dated 26 February (JB.112). He made reference to the welding being carried out and being inspected by Axiom Inspection Solutions. The company was contacted and asked about the matter. They wrote to the respondents on 26 February (JB.115):

"*Generally welding quality was ok, the poor profile in areas. Isolated small pores may not have been marked up, as these are acceptable to spec within when < 2-3mm dia-when clustered together this deemed not acceptable Cracks and lack of fusion are your "major anomalies that are more serious", "linear" indications.*"

42. Mr Donnelly was asked why his staff had got wet in the process. He responded by e-mail of 26 February (JB.117). He wrote: "*To put it into context, he said the initial thing that raised alarms with him was that on arrival & work set up he was made aware there was to be "no use of water" in any ops ongoing that day – strange one, I have never heard this myself when in. So when he noted water pooling and dripping onto them whilst working underneath the tank he made sure to mention this after departing the vessel. He couldn't be sure of where the water was coming from, though it was towards the inlet/ outlet pipe side of the sewage tank, may even have been coming out the side of it."* He then indicated he had noted a missed weld and suggested the area should have been completely finished and checked by Mr Addison before being tested by them.

43. Mr Milne wrote to the claimant on 1 March rejecting his appeal (JB.118/119) He wrote:

"*I have looked at all the information and spoken to the people involved. In reference to your comments, I make the replies as follows:-*

- *I appreciate that you may not acknowledge that 2psi is the industry standard for pressure testing a tank but I, after 30 years in this business and after reading and pricing many thousands of customers specifications can evidence this is industry standard.*

- *I acknowledge there was not a method assessment in place for such pressure testing activities but after a review of safe working practices this has been implemented. This only took around 4 hours to have implemented so could have easily been actioned during these repairs had it been requested.*

- *We acknowledge that the tank was MPI'd by a third party and whilst they too also overlooked the missing weld that caused part of the re-work this was not as obvious to them as it should have been to you and with a visual inspection being completed prior to organising them to come in. It is only their remit to inspect the weld presented and not to quality check our works although they will reject welding not within parameter.*

- *There is also the matter of the exhaust mount job for which from reading the statements, no fire watch was in place, a job you were also supervising.*

- *We also must consider the earlier warning letter you were issued with for the Air Cushion barge works where there was a lack of supervision which you acknowledge and accepted at the time. This letter noted that any future failings may put your job at risk.*

I do acknowledge that you are not responsible for the poor welding carried out by others but you are paid as a project manager and part of that is the supervisory role of the tradesmen. You have not shied away on previous occasions of removing those with a lack of skills so are aware of the requirements for this type of work.

Unfortunately, as a direct result of the lack of supervision on this earlier job the company had to refund the customer around £40,000.00 and this *incident could have been around £125,000.00 had it not been for a delay caused by the vessel owners which allowed us time to carry out the remedial works.*

We also must consider the lack of fire watch on the exhaust mount job which could have been catastrophic.

In summary your appeal is denied.''

44. The claimant was unemployed following his dismissal. He obtained alternative but less well-paid employment on the 26 April 2021.His net weekly pay was £716.96.

Witnesses

45. Mr Massie was a confident witness who had a good recollection of events. He came across as someone who was decisive. He was at times credible and reliable witness although I did not find some of his evidence convincing or credible such as how it could be a fair disciplinary process when the claimant did not see the evidence he had obtained. I was also not convinced that his concerns about penalties arising from the repair of the sewage tank were wholly genuine. He saw matters in a rather black and white way and although he had as he described it HR responsibilities he seemed to have limited insight into the lack of a fair procedure adopted both in relation to the issue of a verbal warning and the disciplinary process he oversaw.

46. Mr Milne was generally credible and reliable as a witness. Although he said he was aware of the ACAS Code he also seemed to be unable to appreciate the difficulties caused by the earlier flawed disciplinary hearing and did not take the opportunity of rectifying those difficulties when dealing with the appeal.

47. I found the claimant to be generally a measured and careful witness whose evidence I mostly accepted as credible and reliable. He conceded that he had made an error in relation to failing to close the permit when Mr Graham left work and add a new responsible person. I found it difficult to accept that he had ‘‘repeatedly’’ asked Mr Connaghan for the Air Pressure Risk assessment. This was denied by Mr Connaghan. I do accept that there was an exchange about the existence of the Risk Assessment and an explanation that Mr Massie would have to make one up but suspect that the matter was then forgotten. If the claimant had chased the matter up and got nowhere then I would have expected him to put his request in an email or raise it directly with Mr Massie. In any event it turned out that the lack of a Risk Assessment was a red herring as the claimant had not considered using the air pressure test for which it would have been required. Preferring the method, he had agree with the Engineer. That method would not require welding work to seal up inlets and outlets in the tank before testing.

Submissions

48. Both solicitors gave brief submissions but also helpfully lodged written arguments.

Respondent’s submissions

49. Mr Falconer began by referring to the range of reasonable responses and then examining the evidence. He conceded that there had been no risk assessment for air pressure testing but asked the Tribunal, to accept that it would have taken 4 hours to prepare one. The employers here in his

submission had a fair reason for dismissal and Mr Massie's decision was proportionate and considered carefully.

50. He reminded the Tribunal that in any event Mr Addison's evidence was that he did not contemplate using this method. He submitted that Mr Addison's evidence was that he had made multiple requests to Mr Connaghan. It may be understandable that he might be reluctant to call either as witness in support of his assertion, but (first) this is specifically denied by Mr Connaghan in the post disciplinary email exchange, (second) this was not consistent with Mr Milne and Mr Massie's evidence as to how attentive Mr Connaghan was to his duties and (third), if true Mr Addison could have raised the matter during daily briefings or emails and it seems highly improbable that a man of Mr Addison's avowed experience knowledge and training would not make a written request at some point to cover his back if he thought it was needed. Mr Massie's reasons for the dismissal related to the conduct of Mr Addison, it related to Mr Addison's own conduct and failures in supervision and record keeping.

51. The solicitor then turned to consider the importance of the live written earning. The failure of Mr Addison to keep time sheets resulted in a liability of £40,000 for the company. His position was that regardless of label or description as "written verbal warning" Mr Addison knew from the warning letter issued on 14 December 2020 (JBp81) that his job was at risk.

52. He was warned in clear terms:

> "*Any further failings in performance resulting in financial loss such as this then we will have to seriously consider your position with the company and your job may be at risk."*

53. The Tribunal was asked to accept the evidence of both Mr Massie and Mr Milne as credible and reliable. They were prepared to accept where they may

have made errors. They are also prepared to concede points that are not in their favour. Mr Addison in contrast would not accept there is anything that impacts his reputation. There was he continued a recurrent theme of Mr Addison blaming others for example blaming the foreman on the air barge job.

54. The Tribunal, he said, has had the benefit of detailed explanations from Mr Massie and Mr Milne on how the work might have been planned and carried out within a reasonable timescale. This was not hindsight on the part of Mr Massie or Mr Milne, but a clear and evident lack of foresight and planning on the part of Mr Addison. There is no doubt that the failure to plan and supervise the welding caused delays and remedial works between £5000 and £6,000.

55. It should be noted that in the appeal Mr Addison sought to lay the failure in tracing faulty welding at the door of the independent quality control- (who were only supposed to be called in once he was satisfied that the job was right. Mr Milne has explained that it is the responsibility of the supervisor to monitor the work and call for quality assurance once they are satisfied the job is ready.

56. Mr Falconer then turned to the 'Firewatch' incident. Mr Addison points to both the CalMac Near Miss record (JBp82) "there was a Firewatch but not in that location" and (JBp93) Incident Reporting form – Yard Safety Rep Mr Connaghan as conclusive evidence that Mr Addison did set a fire watch. Mr Massie was very clear that Mr Connaghan's conclusions were based on initial discussions with Mr. Addison that the firewatchers were in place. The statements obtained by Mr Massie during his investigation are also clear but contradict Mr Addison's position. The minute of the disciplinary meeting signed by Mr Massie and Mr Addison (JBp101) confirms that while he may not have shown Mr Addison statements, that Mr Massie put to Mr Addison that there was a statement obtained as part of the investigation that when discussing welding at 15.30 he said fire watchers would not be required. Mr

Addison would know who was on the job at the time, he knew who he might have been speaking to at 3.30 and if he felt there was any element of grudge or bad feeling on the part of Aidan Kane, he could have made the point at that time. He did not make it then; he did make it at appeal. Mr Addison made no such allegation about Mr Graham who also contradicted him. It was Mr Addison's evidence that there were a minimum of 2 and up to 4 people on fire watch when the alarm went off. The alarm went off at 14-05 or 14-10. Mr Addison could not advance any reason why the Romanian workers that Mr Massie went back to on 4 February before finalising his decision would give evidence that directly contradicted his version of events on their start times.

57. Mr Massie agreed that the alarm itself was a minor incident but the potential implications for safety and the continuation of the contract were much larger. Mr Milne took a much firmer view on the seriousness of a potential fire in a dockyard. He agreed that the potential implications for safety and the continuation of the contract were potentially catastrophic.

58. We have clear evidence of what was in Mr Massie's mind when he dismissed (JBp109-111). He gave multiple reasons. The primary reason related to what Mr Massie saw as falsification of documents. Mr Massie regarded that as gross misconduct. This part of his decision was not appealed. Mr Massie had a genuine concern over what he saw as falsification of Company documents that he regarded as gross misconduct. His evidence related to the work permit. Mr Addison was adamant it was the same job and he could add names. Mr Massie was very clear in his evidence that this was only possible provided the same nominated responsible person was on site. Mr Massie was also looking at a series of failures in a relatively short period that damaged caused to the trust and confidence between the employer and employee, and whether the employer could reasonably conclude that the employee's behaviour would not change in the future. It is trite law that tribunal should not substitute its own view as to what was procedurally or substantively fair or not for that of the employer (i.e., it should not ask itself whether a lesser penalty

would have been reasonable but rather whether dismissal (and the procedure undertaken in respect of that dismissal) was reasonable).

59. If, he continued, the Tribunal found that there were serious flaws in the procedure the respondent's position was that it would have made no difference as the claimant would have been dismissed in any event. If the dismissal is adjudged unfair then the claimant's actions contributed to his dismissal and he should receive no compensation.

Claimant's Submissions

60. Mr Milvenan first of all reminded the Tribunal of the terms of the statutory test (S.98 (4) Employment Rights Act 1996). His position was that no employer, acting reasonably, would have dismissed Mr Addison for the reasons which the respondent treated as sufficient reasons for dismissal.

61. He then turned to procedural fairness submitting that when interpreting the statutory requirement for reasonableness, in order to act reasonably, an employer must follow a fair procedure when dismissing an employee. In relation to misconduct dismissals, this includes following the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Code sets out recommendations as to the procedure employers should adopt prior to dismissing an employee. A Tribunal should take any relevant Code of Practice into consideration in so far as its provisions are relevant.

62. The ACAS Code, he pointed out, sets out key principles for assessing procedural fairness in misconduct cases include the requirement that the employee should know the case against them and should be allowed to make representations (Paragraph 9).

63. In the circumstances of the allegations Mr Addison faced, set out in the letter from Mr Massie of 28 January 221 the allegation related to repair work on a

sewage tank. When Mr Addison attended the disciplinary meeting also asked about another incident which was apparently at investigation stage according to Mr Massie's evidence and the disciplinary meeting minute (at page 100). Mr Addison had no prior warning of this allegation. No opportunity to consider issues or how to respond. He simply asked questions about the incident as recorded in the disciplinary minute at pages 100 & 101. Without prior notice of this allegation he is caught unaware. He responded to questions posed by Mr Massie to best of his ability. Those seven questions asked of Mr Addison without prior warning are the extent of the input sought from him in relation to that allegation. The failure to provide notification of this second allegation is breach of the requirement of paragraph 9 of the ACAS Code to be notified in writing and to contain sufficient information. The failure to do so is a breach of the principle of a fair procedure.

64. The employer failed to go through the evidence and ask for a response. The tribunal heard evidence that two witness statements referred to at the disciplinary meeting those of Andrew Graham and Aidan Kane. Mr Massie confirmed neither were passed to Mr Addison before the meeting or at the meeting.

65. Mr Massie's evidence was that he then carried out further investigation into fire alarm incident and obtained more statements from three further individuals carried out the welding work that led to the fire alarm sounding. These were from Misip Marian, Iorgulescu Inel Gheorghe, Ghioca Adrian and Charlie Connaghan (JB p89 to 92). Mr Massie confirmed these statements also not passed to Mr Addison prior to decision being made on terminating his employment. Similarly, further documentation was obtained as part of investigation. He obtained report from Mr Charlie Connaghan. A CalMac Near miss record was also obtained (document 16, page 82). Neither were referred to at the disciplinary meeting as Mr Massie confirmed in evidence. He also gave evidence to advise these documents obtained as part of investigation not provided to Mr Addison for comment. When suggested to Mr Massie in cross examination that he should have done so to be fair to Mr

Addison, he replied that he didn't see how showing the statements to Mr Addison would have changed his answers. The failure to provide this information from the investigation was a breach of the basic principle of fairness set out in paragraph 12 of the ACAS Code.

66. The landmark case of **Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)** established that where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair.

67. Mr Milvenan accepted that the respondent had demonstrated a potentially fair reason for dismissal namely conduct. The issue was whether the dismissal was fair. In his submission the disciplinary allegations had not been made out and the decision to dismiss falls outside the band of reasonable responses. He asked the Tribunal to accept that his client was honest and a credible and reliable witness. He also accepted that Mr Massie's evidence was generally credible and reliable but that he was clearly incorrect when trying to portray the disciplinary process as fair and to justify not providing the claimant with the evidence he had obtained. Both Mr Massie and Mr Milne seemed unaware of the importance attached to a fair process.

68. Turning to the first stage of the *Burchell* test he submitted that Mr Massie did not establish that he had a clear and genuine belief that the claimant was guilty of gross misconduct. The reason given by Mr Massie for finding that Mrs Addison had committed the alleged misconduct in relation to the allegation concerning the sewage tank work was that the wrong test had been carried out following welding work. Mr Massie believed that an air pressure test should have been carried out on the tank to prove its integrity. He relied on his own experience to form that view. He looked no further.

69. The claimant had explained at the disciplinary meeting that he conducted a test by filling the tank with water. He explained that did so because air pressure test had not been properly risk assessed and to conduct that test without proper consideration of the risk could potentially lead to injury or damage. Mr Massie acknowledged that there was no risk assessment in place that he could use. Mr Addison carried out the hydro test as a result of using the benefit of his vast experience in the industry. Mr Massie had acknowledged Mr Addison; experience in ship work which was evident from his CV. Mr Addison also explained he had asked for the risk assessment for air pressure testing from Mr Connaghan but that had not been produced. Mr Massie cannot form genuine belief that carrying out the test that he did was an act of gross misconduct in the absence of information that shows Mr Addison's actions in conducting hydro test to have been so wrong as to amount to an act of gross misconduct.

70. In relation to the second allegation regarding the fire alarm Mr Massie found that there had been a breach of company permit to work procedure and hot work procedure. These procedures were not produced. He came to that conclusion because he preferred statements of workers involved in work who stated there was no fire watch in place rather than Mr Addison's account that there were. He cannot have a genuine belief that there was no fire watch in place when he was also provided with information from a near miss report produced by Cal Mac (doc 16 page 82) that a fire watch was in place and also a report prepared by respondent's own health and safety officer Mr Connaghan which also confirmed a fire watch was in place (doc 26 page 93).

71. Mr Massie said that the company had suffered reputational damage. He confirmed in evidence that he had not been informed of any reputational damage by the ship operator. He could not genuinely believe this to be correct because he had no information to form that conclusion.

72. Mr Milvenan then turned to stage 2 of the Burchill test and whether the respondent had reasonable grounds to sustain their beliefs. He suggested that the respondent did not have reasonable grounds for belief of guilt because they failed to obtain sufficient information to establish the facts that the decision relied upon. There was an absence of information that showed Mr Addison had carried out the wrong test. Mr Addison provided a perfectly acceptable explanation of why he acted in the way he did based on his experience in the industry.

73. In relation to the fire alarm issue, Mr Massie relied on the statements of all employees involved in the incident. Those employees stated there was no fire watch in place. It was not reasonable for Mr Massie to rely on these accounts. Firstly, Mr Addison's position as superviser meant he was not popular amongst the workers. Secondly, Mr Massie failed to take account of the two reports prepared into the incident namely the CalMac Near Miss report and the report from Mr Connaghan. The issue would then be whether the fire watch was in the correct place. Mr Addison was not shown the witness statements. He was not able to comment on their accuracy or about the issues around the work permit. In relation to Mr Massie's conclusion that the company had suffered reputational damage, there is no reasonable basis for this conclusion because the ship operator had not complained. Therefore, he could not genuinely believe this to be correct because he had no information to form that conclusion,

74. Finally, the respondent is obliged to undertake reasonable investigation. What amounts to a reasonable investigation will depend on the circumstances of each case. This is not a case where the employee is 'caught in the act'. This is a process where the true facts were not readily apparent. Mr Massie and Mr Milne jumped to their conclusions. Therefore, the amount of inquiry and investigation which was required, including questioning of the employees involved, required to increase. As the employer viewed the allegations to be at a level of seriousness to amount to summary dismissal which could impact on Mr Addison's future employment in the industry then

the level of investigation must be greater than it may otherwise have been (***A v B*** [2003] IRLR 405 at para 62).

75. With regard to the sewage tank repair, there is an absence of any information from the investigation to show that the test Mr Addison carried out was not industry standard as Mr Massie claimed. He had not obtained any professional opinion to support his personal view that an air pressure test was the correct course of action.

76. The lack of input from Mr Addison led to issues being largely unchallenged. Had the information been provided then Mr Addison could have relied upon the CalMac Near Miss report and Mr Connaghan's report in his favour regarding the fire watch being in place. He could also have made his own enquiries of others who may have seen a fire watch. He did not receive the information so could not respond. The statements and the reports are detailed. That detail is what shapes the decision making of Mr Massie. Input from Mr Addison would have made a difference to that decision making. He can't make these points to try and influence the decision making as he doesn't know what any of the documents say. That is unfair to him because of lack disclosure.

77. The claimant's position was that the employer cannot rely on the band of reasonable responses.

78. A "verbal written warning" was issued to Mr Addison following a prior disciplinary process. Mr Addison did not appeal that decision as advised not to. Mr Massie accepted in evidence that the warning was at lower end of disciplinary sanction but believed that it was sufficient that one further act of misconduct meant Mr Addison would be at risk of dismissal. This was placing too much weight on the warning.

79. The claimant's solicitor accepted that an appeal can in certain circumstances cure defects in an earlier disciplinary process. The appeal decision is challenged on the same basis as in relation to Mr Massie's decision. Mr Milne did not establish sufficient information to reasonably conclude that Addison's hydro test was an act that justified dismissal. His opinion is that Mr Addison should have carried out an air pressure test. He accepted there was no risk assessment in place as Mr Addison set out in his appeal but believed that a risk assessment could have been completed within four hours to allow the air pressure test to take place. That conclusion unreasonably disregarded Mr Addison's appeal point that it would have been unsafe to conduct an air pressure test in the particular circumstances. That was not assessed.

80. In relation to the fire alarm incident, there was no reasonable basis for his conclusion there was no fire watch was in place when faced with information in the reports mentioned earlier from CalMac and Mr Connaghan. Mr Milne said in evidence that he was unaware that Mr Addison had not received the statements of the workers involved in the fire alarm incident nor the reports of Cal Mac and of Mr Connaghan. He stated that he would not have provided these documents to Mr Addison as it would have made no difference to the outcome. He confirmed he had access to legal advice on the process and that he was aware of the ACAS Code. However, he still believed that he did not require to provide this information or the information he obtained from his own further enquires at (pages 113 -117) to Mr Addison.

81. It is a fundamental part of the ACAS Code of Practice that an employee have the opportunity to comment on information gathered from investigation.

Discussion and Decision

82. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). If the reason demonstrated by the employer is not one that is potentially a fair reason under section 98(2) of the Act, then the dismissal is unfair in law.

83. Conduct is a potentially fair reason for dismissal. It was not disputed that the respondent had a potentially fair reason for dismissal namely conduct.

84. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined by section 98(4) of the Act which states that it: "*depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in 30 accordance with equity and the substantial merits of the case.”*. That section was examined by the Supreme Court in **Reilly v Sandwell Metropolitan Borough Council** [2018] UKSC 16. In particular the court considered whether the test laid down in **BHS v Burchell [1978] IRLR** 379 remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it was not concerned with that provision. He concluded that the test was consistent with the statutory provision. Tribunals remain bound by it.

85. The Burchell test remains authoritative guidance for cases of dismissal on the ground of conduct. It has three elements (i) Did the respondent have in fact a belief as to conduct? (ii) Was that belief reasonable? (iii) Was it based on a reasonable investigation? Tribunals must also bear in mind the guidance in **Iceland Frozen Foods Ltd v Jones** [1982] ICR 432 which included the following summary: *“in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer…….the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*”

86. The way in which an Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was also considered and the law summarised by the Court of Appeal in **Tayeh v Barchester Healthcare Ltd** [2013] IRLR 387.

87. Lord Bridge in **Polkey v AE Dayton Services** [1988] ICR 142, a Judgment of the House of Lords, referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct: *"in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation*."

88. A fair investigation should be even-handed and take into account evidence that could be in the employee's favour (***A v B*** [2003] IRLR 405, EAT), ***Leach v OFCOM*** [2012] IRLR 839). 67.Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett*** 1988 IRLR 497, that *"at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be 15 situations where the issue is one of pure inference*. *As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase.*"

89. The band of reasonable responses has also been held in the case ***Sainsburys plc v Hitt*** [2003] IRLR 223 to apply to all aspects of the disciplinary procedure. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

90. Tribunals are required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. They are not bound by it. The Code of Practice is supplemented by a Guide on Discipline and Grievances at Work, which is not a document that the Tribunal is required to take into account but which gives some further assistance in considering the terms of the Code of Practice. Under the heading "Investigating Cases" the following is stated: *"When investigating a disciplinary matter take care to deal*

with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. It is not always necessary to hold an investigatory meeting….." Under the heading of "Preparing for the meeting", which is a reference to a disciplinary meeting, is included "Copies of any relevant papers and witness statements should be made available to the employee in advance."

91. A finding that there was gross misconduct does not lead inevitably to a fair dismissal. The test for gross misconduct is a contractual one based on an objective analysis of the evidence.

Observations of Evidence.

92. In some respects, this was not an easy case because of the manner in which the various issues were approached by the respondent company. It must be accepted that they do not employ a trained HR specialist, but they clearly are a reasonably large concern having three separate yards and access to legal advice when needed. Mr Milne indicating that he had obtained some telephone advice at the appeal stage before determining its outcome. Both Mr Milne and Mr Massie gave the impression that they somewhat 'shot from the hip' There was an appearance that the various allegations were not considered carefully nor was there thought to be any requirement to go through them with the claimant point by point. The claimant's fault may have been readily apparent to the respondent's managers, but it was no so clear cut to the Tribunal that a reasonable employer would have formed the conclusions they had quite to readily.

93. There was also a certain amount of hyperbole. In evidence it was accepted by the respondent's managers that the fire alarm incident itself was minor. It does not appear from the dismissal letter (JB109/111) to have featured as one of the main reasons for dismissal (they appear to have been the possible financial repercussions) and not to have ranked a mention at all in the letter

dismissing the appeal (JBp118/119) Yet at the hearing the 'firewatch incident' and the possible ''fabrication'' of the Work Permit featured significantly in Mr Massie's evidence justifying dismissal on the grounds of gross misconduct. It was clear that in fact Mr Massie and Mr Milne relied on a number of issues to justify dismissal at the time but mostly relied on the financial consequences of the Air Barge and Sewage Tank work.

94. Another feature of this case was the evidence that was not presented to the Tribunal. The disciplinary policy was not produced. There was no written policy produced that might shed light on the way in which Work Permits should be used or what the respondent's expectations were. This comes against the background that if the claimant was said to be in error in having names added to the work permit when the 'job' outlined in the permit was continuing after the two Scottish staff left. At it's highest this was said to be possible falsification of company records namely of the claimant adding the names of firewatchers. There was no independent view sought on whether filling the sewage tank with water was acceptable practice. To be fair the process itself was not really attacked rather the length of time it actually took.

95. On a more general point one of the features of this case is that unlike perhaps other industries there appeared to be a lack of recorded communications (emails and texts) which are now such a common feature of the workplace between the claimant and others in the company such as Mr Massie. I gained the impression that the company was very busy and staff possibly under pressure. It was noteworthy and this might explain that there appeared to be no regular communication by for example email both from managers like Mr Massie communicating issues, asking for updates setting expectations, explaining contractual obligations and no emails apparently generated by the claimant pointing out possible difficulties, explaining delays and so forth. If for example there was a real risk of penalties being incurred on the CalMac work I would have thought that this would have been communicated in no uncertain terms. Neither side sought to call Mr Pollock who, as the claimant's line manager was in a position to answer some of these questions in the absence

of recorded communications as he appears to have been the conduit between the claimant and higher management.

First Written Warning

96. The claimant was asked to attend a disciplinary meeting on 3 December 2020 in relation to work carried out on an Air Cushion Barge. The claimant supplied a Statement at the time (JBp73) as did others such as Mr Milne and Mr Pollock into the investigation. The main issue appears to be that a welder was seconded to work for another contractor and his hours not properly recorded and that the quality of some of the welding was poor. It is clear from the statement of Mr Pollock that the supervisor on the job was Mr Thomson and that the claimant, who had other responsibilities, attended only when the job was busy. He was not responsible for invoicing the work. Mr Thomson must have had the primary responsibility of ensuring the work on site was of good quality. Mr Pollock was aware that a VO (Variation Order) had been raised to cover this and he does not seem to have checked that time sheets were being kept to record the work and allow proper Invoicing. It is not clear from the minutes that the claimant accepted any fault other than not being aware of the preferred Invoicing process used by the respondent (page 78).

97. It was accepted that a verbal warning was the lowest form of warning that the disciplinary rules provided for. The letter dated 14 December does no more than record such a warning indicating that it will remain ‘live’ for six months. I am quite prepared to accept the claimant’s evidence that Billy Pollock told him to forget about appealing as the warning was just a verbal one and would disappear in six months. That seems common sense advice although advice that the claimant now regrets taking. The important aspect of the warning was the addition of the warning that any ‘further failings in performance’ would put the claimant’s job at risk. If as Mr Falconer suggests this was akin to a final or at least very serios warning why was it tagged onto the lowest form or warning the employer could give? In addition it is by no means clear that the respondent had a clear basis to blame the claimant for losses arising out of

the contract. The evidence was that it was a complex dispute covering a number of issues and the respondent was unable to fully demonstrate that much of the faulty welding occurred when the barge was constructed and before any involvement by the respondent. The allegation that the claimant had been responsible for this loss was never put to him nor was responsibility allocated between the those involved. In these circumstances any manager acting reasonably looking back at this warning and being aware of the background as Mr Massie was would be unlikely to put much weight on its issue or the reference to the claimant causing the company losses of £40,000. It seems that this matter did strongly influence Mr Massie and Mr Milne when considering dismissal.

Sewage Tank Issue

98. There was considerable discussion around the repair of the sewage tank for the CalMac vessel. It is not in dispute that the original job tendered for was to replace the tank with a new one withing a period during which maintenance was being carried out on the ship. This was what was originally contracted for and despite the absence of any contractual documentation being produced vouching this the Tribunal is prepared to accept that there were probably penalties attached to non-completion of the work within a particular period at least for the original work. The original plan had to be changed as the tank was stuck in Europe where it had been made and was not going to arrive in time. Given that this is a variation in the contact at the behest of the client, CalMac, it seems unlikely that they could insist on the original time scale unless the respondent's managers agreed to it. Again, there is a lack of any evidence around this matter or any suggestion that the claimant was told that there were penalties if the tank could not be repaired in this timescale. It was not clear why if time was running out there was no intervention in the works by Mr Massie or Mr Pollock. It would be highly unusual for a company to bind itself in this way given that there was no guarantee that the tank was in fact repairable at all.

99. The claimant was put in charge of repairing the tank. Some time was spent discussing the appropriate way to assess if the tank was watertight. Mr Massie and Mr Milne were surprised that water was used by him to identify any holes left after new plates were welded on. They would have used an air pressure test whereby the tank would be made as airtight as possible this would involve welding closed any outlets) and pressurised this showing up any air leaks. Mr Addison countered that there was no Risk Assessment for such a test, and this was accepted to be the case. The respondent's managers however countered that it would only take 4 hours to prepare on and this would still have been quicker in the long run. They would also have needed a Method Statement, but it can be assumed that given that the test was commonly in operation this would not be a significant or time-consuming hurdle.

100. It must be borne in mind that the tank was heavily corroded and the repairs likely to be temporary. I find it difficult to fully understand the criticism levied at the claimant that after discussing the matter with the ship's Chief Engineer, it was agree to cut the tank off the deck, hoist it up and fill it with water to the operating level and in this way to identify leaks. It weights the length of time it takes to fill and empty of water against the welding time involved in sealing and unsealing it that would be needed for an air test. The claimant also contended that an air test would be dangerous given he state of the tank. Mr Massie queried why was the Chief Engineer involved. That view hardly sits well with his evidence that the respondent company was keen to make a good impression on CalMac. I would have thought that keeping the Chief Engineer happy was likely to keep his employers content.

101. The claimant records that the vessel docked on the 5 January. It was not until the 11 January that a decision was made to repair rather than replace the tank. It turned out that the tank needed considerable repair and the time for carrying out this work overran the initial time scale which, of course, was for the welding in of a new tank. I struggle with the respondent's position. If using water can identify leaks and this can be done in a reasonable period, even if not the company's preferred process, and it is a process suggested by a very

experienced person like the claimant, and without objection by the Ship's Engineer, then it is surely not gross misconduct to use it. I would observe that if the respondent's managers were concerned about the issue of penalties or the time being taken for repair I would have expected emails or texts or at least some evidence that the time limits were brought to the claimant's attention or indeed intervention by Mr Pollock or Mr Massie.

102. The quality for the welding work on the tank was also an issue. After welding they were inspected as is the practice by an independent company. There were no photographs produced but the report obtained after the claimant was dismissed (JBp115) states that the welding was generally ''okay'' It was also raised that the testers had been brought in too soon before the repairs were fully finished but the work was urgent. Mr Donnelly writing to Mr Massie at a later point wrote (JBp117) that the area should have been finished before testing but commented that this sometimes this may not be feasible. The respondent's managers as part of their investigation did not seek to contact the Ship's Engineer for his views or to check if penalties could actually be contractually be levied.

103. One other issue arose and that was the space below the tank which was a ballast tank had not been air pressure tested. The claimant referred to the lack of a RA but also wrote (JBP104) That it had been agreed by the LR Surveyor (Lloyds Register?) and the vessel's Technical Superintendent that Metal Particle Inspection should be undertaken and a pressure test was not requested. This was not checked with either of the two parties mentioned but was referred to in the letter of dismissal and in evidence as being part of the grounds for it.

Firewatch Incident

104. The final matter that the respondent seeks to add to the reasons for dismissal related to the claimant's supervision of work on the Caledonian Isles. On the 2 February there was a firm alarm set off during welding work. The permit for this hazardous wok was in the name of a Mr Graham. who left as scheduled

at 4.30pm in the afternoon while the work continued to 7pm. Initially the matter was treated as a minor, although potentially serious, matter. However there came to be a number of criticisms levelled at the claimant although not set out in this way. The first was that the permit should have been closed when Mr Graham left and a new one issued with a new nominated responsible person on it. The claimant took the view that it was the same work and could be closed off later. He conceded during the proceedings that this might have been an error and he should have nominated a new responsible person probably himself. This was said to be a breach of policy. Although no such policy was produced this seems in accordance with the Tribunal's general understanding of the permit system that this should have occurred, and the claimant accepted the hearing that he may have made an error.

105. The second criticisms were that there were no firewatchers and the names of Romanian staff added as firewatchers later to cover up this failure. In the hearing a further criticism emerged and that was not spotting that the cupboard below the deck that was being welded had been identified as being at risk of heat transfer. The claimant's response was that the area had been surveyed by him with an experience crew member and by implication he had taken reasonable care to identify the area risk.

106. It is instructive to return to the disciplinary hearing and see how this matter was dealt with (JBp100). The claimant is asked if A Graham and A Kane were on the permit. He responded that they were. He was asked when the additional workers were added and responded before the fire alarm went off. He was then asked why the permit wasn't closed when Mr Graham left at 4.30pm. He responded that the three others were added to allow the work to be finished. He was sked if there were firewatchers in place and answered that there were. He was then asked: ''*One of the statements taken …notes that when discussing this welding work..you said that fire watchers would not be required, is this correct?''*

107. That was the sum total of questioning about matters that the respondent appears now to place considerable importance upon. There were in fact two statements. The claimant was not shown what Mr Graham or Mr Kane said in their statements dated 26 January. The other statements were taken on the 4 February after the disciplinary were never shown to the claimant. The claimant in explanation said that the three Romanian workers were added before the alarm went off. It is unfortunate that no efforts appear to have been made to identify and speak to the crew member who spotted the smoke coming from the cupboard. He would have been able to put beyond doubt whether there were fire watchers present or not. It might also explain why CalMac seem to have believed that there were firewatchers present. The statement of ‘‘Adrian’’ appears inconsistent with that of the two Scottish workers. He wrote that he was sent by the claimant to work with two Scottish workers (presumably Mr Kane and Mr Graham) and the two Scots acted as fire watchers while he welded. He then writes: ‘‘we were welding …a member of the crew came and stopped us, saying that the smoke alarm started under the deck a few metres away’’. He then says that the two other Romanian workers arrived, once the Scottish workers left, to allow the work to proceed. He then confirms that their names were put on the work permit by their foreman ‘‘Croitoru Alex’’ The foreman was not interviewed but the addition of the names by him give some credence to the claimant’s position that he could not add them as he didn’t know how to spell their names and asked the foreman to do it for him. The exact circumstances in which this occurred was not investigated. This seems to undermine any suggestion of fabrication of the permit at least directly by the claimant.

108. No reasons were advanced as to why these witnesses could not easily have been spoken to. This occurred against a background that shows that the setup of the job and when and how fire watching had been organised was by no means clear cut or straight forward. There was perhaps rather a rush to judgment here which I believe no reasonable employer would have made given the claimant’s many years of experience and the seriousness of the

alleged failures. That is not to say that the respondent's managers did not make some investigations but there appears to be little effort to follow up matters raised by the claimant in mitigation or explanation. Rather there was a concentration on the possible financial ramifications around the repair of the tank which again are by no means clear cut or fully investigated.

109. The solicitor acting for the respondent correctly pointed out that the ACAS Code was guidance. That is of course true, but it is carefully considered and written guidance that an employer would do well to heed. At the heart of the Guidance are some common principles of fairness. One is to be warned in advance as to what the disciplinary charges are to allow the employee to understand what the allegations are, to then see the evidence and be allowed an opportunity of fully responding. At the hearing the claimant accepted that he could add nothing to his position about the fire watch incident. This did not apply to the other matters. But if he had been shown the statements at the time he might have been in a far better position to comment and if the employer had gone through these matters with him so as to gain a greater understanding of the way the work was carried out then there would have been the opportunity to raise matters that should be clarified or of convincing his employer that he was not guilty of misconduct.

110. I will only mention the appeal briefly. It did not cure the fundamental problem with the earlier disciplinary. There was no review of the case rather Mr Milne concentrated on the matters raised in the appeal which related to the NDT testing. There was no meeting to discuss the appeal and it was rejected by letter dated 1 March without disclosure of the various statements that had been obtained. The appeal concluded by referring once more to the potential loss of £40,000 on the Air Barge project and the financial penalties that might have occurred with the delay in completing the sewage tank work.

111. There are still serious allegations made against the claimant over the supervision/management of the sewage tank work and over the fire watch matter including the failure to close down the work permit to add a Responsible Person and to set a proper fire watch. This raises the ‘‘*Polkey*” question namely

the argument that, as regards compensation, the Tribunal should consider the likelihood of the claimant being fairly dismissed if a fair process was followed. In some cases the employers failings are such that the Tribunal does not have a clear enough picture of events to embark on that exercise. It should be recalled that in *Polkey* there was no dispute about the reason for dismissal. In the present case, despite the criticisms, of the investigation the respondents did carry out a relatively full although incomplete investigation.

112. In these circumstances, I conclude that it is appropriate to make a *Polkey* reduction. The fire watch incident is by far the most potentially serious matter. I accepted that it was vital when hazardous 'hot' work was being carried out that the job was properly assessed, and firewatchers arranged. I also accepted that the permit system is an important safeguard and part of this is to have a nominated person responsible for the work. It is not an easy matter to assess as the respondent company appears to have given the other disciplinary issues more prominence. Nevertheless, in evidence, which I accept, the respondent's position was that not having set fire watchers alone was in their view capable of amounting to gross misconduct itself. The conclusion I have reached is that despite the flaws in the disciplinary process there was a high probability that if a fair procedure had been adopted the claimant would have been dismissed. I also considered the issue of contributory fault but standing back from the matter my view is that it is just and equitable to only make a *Polkey* reduction although that will be a significant reduction. I therefore will apply a *Polkey* reduction of 90% to the agreed compensation.

113. The claimant is entitled to a basic award based on his length of service and age of £1614 and to £350 for loss of statutory rights. He had wage loss from the 11 February 2021 until gaining employment on the 26 April. This amounts to (£9482.87). He has future loss of £186.17 per week. It is reasonable for him to be compensated for this ongoing loss for a period of 41 weeks. This brings out a figure of £7632.97 (£186.17 x 41). The claimant also lost pension contributions amounting to £297.77 which shall be added to the

compensatory award. The compensatory award amounts to £17763.61 (£9482.87+£7632.97+£350+£297.77) That required to be subject to the *Polkey* reduction bring the award to £1776.36 (£17,763.61/100 x 10).

114. The claimant argued for an uplift for failure to adhere to the ACAS Code. The failure to present the claimant with all the evidence is a serious matter striking at one of the core purposes of the Code and requirement of natural justice namely to know the allegations being made and the evidence. That said the claimant was aware of the general circumstances and some of the allegations discussed. In this case an uplift of 15% is appropriate to reflect these failings. The uplift will apply to the compensatory award. This is now £2042.81 (£1776.36 + £266.45) making the total monetary award of £3656.81 (£2042.81 + £1614).

115. The claimant was in receipt of Job Seekers Allowance and the Recoupment Regulations apply. The prescribed element is that part of the monetary award relating to loss of wages to the date of the Tribunal hearing on the 25 August. That amounts to £13206.27 (£9482.87 covering the period to 26 April 2021 plus £3723.40 as loss of overtime to 25 August a period of 20 weeks). That needs to be reduced by the same percentage as the *Polkey* reduction which gives a figure of £1320.63. The monetary award exceeds the prescribed element by £2336.18 (£3656.81 less £1320.63) which is subject to recoupment.

Employment Judge	**Judge JM Hendry**
Dated	**13 September 2021**
Date sent to parties	**13 September 2021**